

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

EDUARDO I.T., et al.,)	CASE NO. 4:22-cv-05333-DMR
)	
Plaintiffs,)	
)	DECLARATION OF KELSEY J. HELLAND
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

I, KELSEY J. HELLAND, declare as follows:

1. I am an Assistant United States Attorney and an attorney of record for Defendant in this action. I submit this declaration in support of Defendant's Motion To Transfer; Motion To Dismiss Plaintiffs' Complaint filed concurrently herewith. The facts set forth in this declaration are within my personal knowledge or based upon documents and information I have received in the course of this litigation.

2. Attached hereto as **Exhibit A** is a true and correct copy of the CM/ECF docket report for the criminal prosecution of Plaintiff Ignacio P.G. in the District of Arizona. In light of Plaintiff's pending administrative motion to proceed pseudonymously (*see* Dkt. No. 4), I have redacted all potential personally identifiable information from the docket report, including Ignacio P.G.'s true name, the case number, and the days and months of the dates on the docket report. Based on the information currently available, Defendant is informed and believes that Plaintiff Ignacio P.G. was the only Plaintiff in this matter who was criminally prosecuted upon entering the United States.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Order granting the United States' Motion to Transfer in *D.A. v. United States*, No. 1:20-cv-03082, ECF No. 85 (N.D. Ill. Aug. 11, 2022).

4. Attached hereto as **Exhibit C** is a true and correct copy of the transcript of the August 11, 2022 hearing on Defendant's Motion to Transfer in *D.A. v. United States*, No. 1:20-cv-03082, ECF No. 86 (N.D. Ill. Aug. 24, 2022).

/s/ Kelsey J. Helland
KELSEY J. HELLAND
Assistant United States Attorney

EXHIBIT A

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**U.S. District Court
DISTRICT OF ARIZONA (Phoenix Division)
CRIMINAL DOCKET FOR CASE #: 2:18-po- -JFM-1**

Case title USA v [REDACTED]

Date Filed [REDACTED]/2018

Date Terminated [REDACTED]/2018

Assigned to Magistrate Judge James F
Metcalf

Defendant (1)[REDACTED]
TERMINATED [REDACTED]/2018

represented by **Carlos A Velazquez Marrero**
Federal Public Defenders Office Tucson
407 W Congress St., Ste. 501
Tucson, AZ 85701 1310
520-879-7500
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Public Defender or
Community Defender Appointment

Pending Counts

None

Disposition**Highest Offense Level (Opening)**

None

Terminated Counts

None

Disposition**Highest Offense Level (Terminated)**

None

Complaints

8:1325(a)(1) Illegal Entry

Disposition

Sentence Time Served Special
Assessment: Remitted

Plaintiff

USA

represented by **Joshua Stanley Rowen Kolsrud - Inactive**

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation Assistant US Attorney

Date Filed	#	Docket Text
■■■■/2018		Arrest of ■■■■ on ■■■■/2018. (ADI-JMA,) (Entered: ■■■■/2018)
■■■■/2018	1	COMPLAINT as to ■■■■. (ADI-JMA,) (Entered: ■■■■/2018)
■■■■/2018	2	MINUTE ENTRY for proceedings held before Magistrate Judge James F Metcalf: Status Conference re: Initial Appearance Without Defendant as to ■■■■ held on ■■■■/2018. Carlos Velazquez appointed for defendant. Presence of defendant is waived. Due to the unavailability of Mam interpreter, hearing unable to proceed. Matter is continued to ■■■■/18 at 10:30 AM before Magistrate Judge James F. Metcalf, Appearances: AUSA Louis Uhl (Duty) for the Government, AFPD Carlos Velazquez for defendant. Defendant is not present and in custody. (Recorded by COURTSMArt.) Hearing held 2:15 PM to 2:20 PM. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (JMA) (Entered: ■■■■/2018)
■■■■/2018	3	MINUTE ENTRY for proceedings held before Magistrate Judge James F Metcalf: Initial Appearance, Plea and Sentence Hearing as to ■■■■ held on ■■■■/2018 Defendant enters a plea of guilty and is sentenced as to the Complaint. Judgment to issue. Appearances: AUSA Joshua Kolsrud for the Government, AFPD Carlos Velazquez for defendant Defendant is present and in custody (restraint level 0) Mam Interpreter Bertilda Mendoza assists defendant. (Recorded by COURTSMArt.) Hearing held 11:32 AM to 11 47 AM This is a TEXT ENTRY ONLY There is no PDF document associated with this entry. (AJG) (Entered: ■■■■/2018)
■■■■/2018	4	JUDGMENT AND COMMITMENT ISSUED as to ■■■■ (1), Sentence: Time Served. Special Assessment: Remitted. Signed by Magistrate Judge James F Metcalf on ■■■■18.(AJG) (Entered: ■■■■2018)

PACER Service Center			
Transaction Receipt			
11/22/2022 11:17:55			
PACER Login:	khelland	Client Code:	
Description:	Docket Report	Search Criteria:	2:18-po-■■■■JFM
Billable Pages:	2	Cost:	0.20

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS**

D.A., et al.)	
)	Case No: 20 C 3082
v.)	
)	Judge: Martha M. Pacold
United States of America, et al.,)	

ORDER

Telephonic hearing held on 8/11/2022. For the reasons stated on the record, defendant's motion to dismiss or, alternatively, to transfer [73] is granted in part. The case is hereby transferred to the Western District of Texas. The court does not address the merits of defendant's motion to dismiss.

(T: 0:20)

Date: August 11, 2022

/s/ Martha M. Pacold

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

D.A., et al.,)	
)	
Plaintiffs,)	Case No. 20-cv-03082
-vs-)	
)	Chicago, Illinois
THE UNITED STATES OF AMERICA,)	August 11, 2022
)	10:31 a.m.
Defendant.)	

TRANSCRIPT OF TELEPHONIC PROCEEDINGS
BEFORE THE HONORABLE MARTHA M. PACOLD

TELEPHONIC APPEARANCES:

For the Plaintiffs: MR. ANAND SWAMINATHAN
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Court Reporter:

KATHLEEN M. FENNELL, CSR, RPR, RMR, FCRR
Official Court Reporter
United States District Court
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Kathleen_Fennell@ilnd.uscourts.gov

* * * * *

PROCEEDINGS REPORTED BY CERTIFIED STENOGRAPHER
TRANSCRIPT PRODUCED WITH A COMPUTER

1 TELEPHONIC APPEARANCES: (Continued)

2 For the Defendant: MR. PHIL DAVIS MacWILLIAMS
3 U.S. Department of Justice,
4 Civil Division, Torts Branch
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25

1 (Proceedings heard telephonically:)

2 THE CLERK: The United States District Court for the
3 Northern District of Illinois is now in session, the Honorable
4 Martha M. PaoId presiding.

10:31:49

5 20 C 3082, D.A. versus United States. If you can
6 state your name for the record, we'll start with plaintiffs'
7 counsel.

10:32:08

8 MR. SWAMINATHAN: Good morning, your Honor. Anand
9 Swaminathan for the plaintiff, and several of my colleagues
10 are on as well. I'll let them introduce themselves.

11 MR. WEIL: Good morning, Judge. Stephen Weil for the
12 plaintiffs.

13 MR. MANFREDI: Zachary Manfredi for the plaintiffs.

10:32:27

14 MR. MacWILLIAMS: Good morning. This is Phil
15 MacWilliams from the Department of Justice for the defendant
16 United States, and I believe some co-counsel are on the line
17 as well who can now introduce themselves.

18 THE CLERK: If there's anybody else announcing
19 themselves, you might be on mute.

10:32:59

20 THE COURT: Okay. Well, it sounds then like we have
21 everyone.

10:33:19

22 Thank you, everyone, for joining. We're here for a
23 ruling on the defendant's motion to dismiss or, alternatively,
24 transfer the case to the Western District of Texas, and that's
25 docket 73. And so I'm prepared to rule today.

1 But let me just ask before I turn to the ruling, and
2 I asked this before in the minute entry scheduling today's
3 ruling, whether there are any developments in the status of
4 the case that the parties would like to bring to my attention
5 before I actually rule on the motion.

10:33:44

6 I haven't heard or I haven't seen anything filed on
7 the docket along those lines, so I take it that there isn't
8 anything of any sort of development like that, and so I should
9 just go forward with the ruling, but just one last chance for
10 anyone to raise anything like that before I move forward with
11 the ruling.

10:34:05

12 MR. SWAMINATHAN: Yes, your Honor. This is Anand
13 Swaminathan for the plaintiff. I know you're aware that we
14 had submitted a number of status reports indicating that there
15 were various settlement discussions that were ongoing, but
16 unfortunately those conversations ended, and so there has not
17 been any further -- any further developments since we informed
18 the Court that those conversations were not going anywhere.

10:34:19

19 THE COURT: Okay. Thank you.

20 And for the government?

10:34:36

21 MR. MacWILLIAMS: Yes, your Honor. This is Phil
22 MacWilliams for the government.

23 And we have nothing to report on that front, so ...

24 THE COURT: Okay. Well, thank you, both.

10:34:52

25 Then I will turn to the ruling, and just by way of

1 information about the format of the ruling, I am going to rule
2 from the bench today, and I'll follow up with a minute entry
3 that gives the bottom line, but in terms of my reasoning, I
4 don't plan to issue a separate written order. I do plan to
5 give all of my reasoning in the ruling from the bench today.

6 The reason for that is just speed and efficiency. As
7 you know, the case has been pending for some time, and so it's
8 just -- I can get you a ruling faster in this format than if I
9 were to write it. But I will give all the reasons from the
10 bench, and so if you need the reasoning, I would recommend
11 that you order the transcript.

12 Okay. So with that, let me turn to the ruling, and
13 I'll just ask for your patience as I walk through the ruling
14 and the reasoning.

15 Again, before the Court is the government's motion to
16 dismiss or, alternatively, to transfer the case to the Western
17 District of Texas. That's docket 73. I'll first address the
18 legal standards that apply to the government's request to
19 transfer the case to the Western District of Texas.

20 28 U.S.C. Section 1404(a) states that "for the
21 convenience of parties and witnesses, in the interests of
22 justice, a district court may transfer any civil action to any
23 other district or division where it might have been brought."

24 With respect to the convenience evaluation, courts
25 generally consider the availability of and access to

1 witnesses, and each party's access to and distance from
2 resources in each forum. See *Research Automation, Inc. v.*
3 *Schrader-Bridgeport International, Inc.*, 626 F.3d 973, 978
4 (7th Cir. 2010). Other related factors include the location
5 of material events and the relative ease of access to sources
6 of proof. *Id.*

7 The interests of justice is a separate element of the
8 transfer analysis that relates to the efficient administration
9 of the court system. For this element, courts look to factors
10 including docket congestion and likely speed to trial in the
11 transferor and potential transferee forums, each court's
12 relative familiarity with the relevant law, the respective
13 desirability of resolving controversies in each locale, and
14 the relationship of each community to the controversy. *Id.*

15 Courts should defer to the plaintiff's choice of
16 forum unless the balance of these factors weighs strongly in
17 favor of transfer. See *In re National Presto Industries,*
18 *Inc.*, 347 F.3d 662, 663-64 (7th Cir. 2003). However, a
19 plaintiff's choice carries less weight where the plaintiff
20 does not reside in her chosen forum, which is the case here.
21 See *Johnson v. United Airlines*, 2013 WL 323404 at *5 (N.D.
22 Ill. 2013).

23 Altogether, the movant bears the burden of
24 establishing that the transferee forum is clearly more
25 convenient. See *CFPB v. Golden Valley Lending*, 2017

1 WL 3970514 at *1 (N.D. Ill. 2017).

2 So that was the legal standard. Turning now to the
3 merits of the government's transfer request, there is no
4 dispute that this action could have originally been brought in
5 the Western District of Texas. Thus, the only issue is
6 whether convenience and the interests of justice favor keeping
7 the case here in the Northern District of Illinois or
8 transferring to the Western District of Texas.

9 I will start first with the convenience evaluation.

10 The parties' ease of access to either forum is
11 neutral. Plaintiffs do not dispute the government's
12 contention that they, plaintiffs, are in North Carolina or, at
13 the very least, reside outside of this district. See docket
14 35, paragraph 60. The government has offices and personnel
15 both here and in the Western District of Texas. Accordingly,
16 the government can litigate just as easily in this forum as in
17 the Western District of Texas.

18 Next, the availability and access to witnesses
19 slightly favors the Western District of Texas.

20 Most of the government employees who will be
21 witnesses are located in the Western District of Texas, where
22 plaintiffs were detained and held and where the majority of
23 the challenged decisions and conduct occurred. That said,
24 because these are party witnesses, their location carries less
25 weight. See *Lewis v. Grote Industries*, 841 F.Supp. 2d 1049,

1 1054 (N.D. Ill. 2012). Nevertheless, this still weighs
2 slightly in favor of transfer.

3 Non-party witnesses reside in both forums.

4 Plaintiff Lucinda Padilla-Gonzales alleges that she
5 received medical treatment and care at hospitals in Texas.
6 See docket 35, paragraphs 22 and 58. These medical providers
7 are likely to be important to plaintiffs' claims regarding the
8 allegedly improper medical care she received, and they are
9 more than 100 miles from this district, meaning they are
10 outside of the Court's subpoena power under Federal Rule of
11 Civil Procedure 45.

12 Plaintiffs assert that non-party witnesses also
13 reside in this district, including employees of former
14 defendant Heartland who were responsible for the care of
15 plaintiffs D.A. and A.A. while they were in Chicago. Similar
16 to the non-party medical providers in Texas, these witnesses
17 would be outside of the subpoena power of the Western District
18 of Texas. Thus, this factor is neutral.

19 Turning to the location of material events, the
20 location of material events weighs in favor of the Western
21 District of Texas.

22 Although D.A. and A.A. were held in Chicago after
23 they were separated from Lucinda, the majority of critical
24 events occurred in the Western District of Texas, and that is
25 where most of the challenged conduct took place.

1 The Western District of Texas is the location where,
2 among other things, and I'll now walk through some of the
3 allegations of the complaint that relate to events occurring
4 in the Western District of Texas. So, again, these are
5 allegations of the complaint, and so the complaint alleges
6 that the following things occurred in the Western District of
7 Texas:

8 Plaintiffs were originally arrested and detained;
9 Plaintiffs' belongings were allegedly taken and never
10 returned;

11 Plaintiffs were held at a holding center at a
12 detention facility, and the complaint alleges that occurred in
13 freezing conditions;

14 Lucinda received medical care at multiple hospitals;
15 Government employees allegedly provided Lucinda
16 inadequate medical care;

17 The government separated Lucinda from D.A. and A.A.;
18 The government allegedly tried to coerce Lucinda into
19 giving up her asylum rights;

20 D.A. and A.A. were held with unaccompanied children
21 in allegedly jail-like conditions;

22 The government allegedly failed to release D.A. and
23 A.A. to their father and instead sent them to Chicago;

24 Lucinda's criminal proceedings occurred;

25 Lucinda was both criminally detained and held in

1 immigration custody; and

2 Lucinda allegedly suffered a traumatic brain injury
3 while being driven by government agents.

4 See docket 35, paragraphs 19, 20, 21, 22, 23, 25, 26,
5 27, 30, 52, 53, 54, 55 and 58.

6 Accordingly, even though some events occurred in the
7 Northern District of Illinois, the bulk of events and the most
8 important events occurred in the Western District of Texas.
9 This weighs in favor of transfer.

10 The final convenience factor is the parties' access
11 to proof. This factor, too, weighs in favor of the Western
12 District of Texas.

13 As plaintiffs point out, this factor has less weight
14 due to the efficiencies of modern electronic discovery. See
15 *In re Hudson*, 710 F.3d 716, 719 (7th Cir. 2013).

16 However, many of plaintiff's claims relate to
17 physical sites or structures located in the Western District
18 of Texas that likely will need to be visited in person or
19 physically inspected. Specifically, plaintiffs challenge the
20 conditions at the holding center where plaintiffs were
21 initially held, the detention center where A.A. and D.A. were
22 held with unaccompanied children, the facility where Lucinda
23 was held pending her criminal hearing, and the immigration
24 detention center where Lucinda was later held. See docket 35,
25 paragraphs 21, 27, 52 and 59.

1 Further, the vehicle Lucinda was transported in when
2 she allegedly suffered a brain injury and the location of that
3 incident are also in the Western District of Texas. *Id.*,
4 paragraph 55.

10:46:06 5 The only comparable site in the Northern District of
6 Illinois is the facility at which D.A. and A.A. were held, but
7 this alone does not outweigh or equal the number of sites and
8 objects located in the Western District of Texas. Thus, this
9 factor favors transfer.

10:46:26 10 Altogether, the convenience factors weigh in favor of
11 transfer.

12 Turning next to the interests of justice. This
13 factor alone can be determinative even where convenience
14 points towards the opposite result. *See Research Automation,*
10:46:46 15 *626 F.3d at 978.*

16 Looking first at docket congestion and likely speed
17 to trial, this factor weighs in favor of transfer. Federal
18 court management statistics published by United States Courts
19 show that, as of March 2022, in the Northern District of
10:47:04 20 Illinois the median time from filing to disposition was
21 7.4 months, and the median time to trial was 53.8 months.
22 Looking at the same time periods for the Western District of
23 Texas, the median time from filing to disposition was slightly
24 longer at 8.5 months, but the median time to trial was almost
10:47:26 25 half as long, at 27.2 months.

1 Thus, this case is likely to be resolved more quickly
2 if transferred. *See Esposito v. Airbnb Action*, 538 F.Supp. 3d
3 844, 849 (N.D. Ill. 2020).

4 Further, the Western District of Texas's familiarity
5 with the relevant law also weighs in favor of transfer.

6 Plaintiffs' claims are brought pursuant to the
7 Federal Tort Claims Act. Claims under the act are governed by
8 the substantive law of the state where the alleged tort
9 occurred. *See Kaniff v. United States*, 351 F.3d 780, 790 (7th
10 Cir. 2003).

11 Here, plaintiffs assert that all of their claims are
12 governed at least in part by Texas law. The only claims that
13 involve Illinois law are plaintiffs' negligent supervision and
14 breach of fiduciary duty claims, which plaintiffs argue are
15 also governed by Texas law. See docket 77 at pages 22 through
16 25.

17 So although this case implicates federal law and
18 Illinois law, the significant bulk of plaintiffs' claims are
19 governed by Texas law with which the Western District of Texas
20 will naturally be more familiar.

21 The last two elements concern the respective
22 desirability of resolving controversies in each locale and the
23 relationship of each community to the controversy. Both weigh
24 in favor of transfer.

25 As already discussed, the critical events in this

1 case all occurred in the Western District of Texas with the
2 exception of D.A. and A.A. being held in Chicago.

3 Further, plaintiffs are challenging the conditions
4 and operation of multiple facilities in the Western District
5 of Texas. Although plaintiffs are not seeking injunctive
6 relief, if plaintiffs were to succeed, this action could have
7 an impact on the operation of those facilities, as well as the
8 government's immigration practices in the Western District of
9 Texas even if the government asserts that some of the more
10 general executive branch immigration policies have already
11 been changed.

12 The only local interest in Chicago is that D.A. and
13 A.A. were held in the custody and at a facility operated by
14 the former Heartland defendants. Those defendants have been
15 dismissed with prejudice, and even if the operation of those
16 facilities might somehow still be impacted by this suit, the
17 lawsuit nevertheless has greater implications for the Western
18 District of Texas than the Northern District of Illinois.

19 Plaintiffs also point out that this case has been
20 pending before this Court for a little over two years.
21 Plaintiffs therefore argue that this Court is more familiar
22 with the case, and that weighs in favor of keeping the case
23 here.

24 Although this case was filed in May 2020, it was
25 stayed for months while settlement discussions occurred before

1 the magistrate judge, and the Court has not addressed or
2 resolved any motions addressing the merits or substance of
3 plaintiffs' suit. In addition, no discovery has taken place
4 to date.

10:50:56 5 Therefore, the Court does not have a significant
6 advantage over the Western District of Texas in terms of
7 familiarity with the case, and the time that this case has
8 been pending does not weigh in favor of keeping the case in
9 this district.

10:51:09 10 Taking into account all of the interests of justice
11 factors, they weigh in favor of transfer.

10:51:28 12 Altogether, convenience and the interests of justice
13 both weigh in favor of transferring this case to the Western
14 District of Texas even though a relatively small part of
15 plaintiffs' claims arise from conduct in Chicago and the
16 Northern District of Illinois is plaintiffs' chosen forum.
17 The heart of this controversy is ultimately based upon conduct
18 and events in the Western District of Texas, and it would
19 clearly be more convenient and in the interests of justice for
10:51:48 20 this litigation to proceed there.

21 Transfer is therefore justified and appropriate. See
22 *Waters v. Leidos*, 2022 WL 657055, at *2-4 (N.D. Ill. March 4,
23 2022); *Esposito*, 538 F. Supp. 3d at 848-50.

10:52:15 24 And so to conclude and summarize, the government's
25 motion to transfer is granted, and the case is transferred to

1 the Western District of Texas. Because the case is being
2 transferred, I will not address the merits of the government's
3 motion to dismiss.

4 That concludes the ruling today. Thank you,
5 everyone, for your time and your attention. Take care.

6 MR. SWAMINATHAN: Thank you, Judge.

7 (Which were all the proceedings heard.)

8 CERTIFICATE

9 I certify that the foregoing is a correct transcript from
10 the record of proceedings in the above-entitled matter.

11 */s/Kathleen M. Fennell*

August 24, 2022

12 Kathleen M. Fennell
13 Official Court Reporter

Date

10:52:31

EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

E.C.B., on behalf of himself and his minor
child, J.R.,

Plaintiff,

v.

United States of America,

Defendant.

No. CV 22-00915 PHX CDB

ORDER

All of the parties have consented to the exercise of magistrate judge jurisdiction over this matter, including the entry of final judgment. Before the Court is Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF No. 15).

I. Background

Plaintiff asserts claims pursuant to the Federal Tort Claims Act ("FTCA"). Plaintiff seeks damages for himself and on behalf of his minor child, based on their forcible separation and detention by agents of the United States government, and the conditions of their detention and treatment by their custodians. The claims are based, *inter alia*, on the following factual allegations:

In May 2018, federal officers forcibly separated Plaintiff Elias from his daughter Jocelin while they were detained in the Yuma County Detention Center in Yuma, Arizona. Federal officers removed Jocelin [who was then eight years old] without informing Elias of his daughter's whereabouts. When Elias asked immigration officers about his daughter's location, the officers told him they were not responsible for looking after her.¹

¹ "Elias" and "Jocelin" are pseudonyms for Plaintiff and his minor daughter, both Guatemalan nationals who entered the United States seeking asylum.

Unbeknownst to Elias, his daughter was sent across the country to a detention center in Miami, Florida without a parent, guardian, or family member. For two months she was confined inside the facility, which only heightened the trauma of confinement and separation. Elias was not permitted to contact her by telephone.

As a result of the government's actions, Elias and Jocelin were separated for nearly five months. They were subjected to abuse and neglect, which caused them substantial and irreparable harm and trauma ...

(ECF No. 1 at 1-2).²

Plaintiff asserts FTCA claims for intentional infliction of emotional distress, negligence, and loss of consortium. Defendant contends the Court lacks subject matter jurisdiction over Plaintiff's claims, arguing the claims fall within exceptions to the FTCA's waiver of sovereign immunity. After Defendant filed a reply in support of the pending motion to dismiss, Plaintiff filed a notice of supplemental authority (ECF No. 22), directing the Court's attention to *A.E.S.E. v. United State of America and Management & Training Corporation*, 2022 WL 4289930 (D.N.M. Sep. 16, 2022), and Defendant filed a notice of supplemental authority (ECF No. 23), citing *B.A.D.J. v. United States*, 2022 WL 11631016 (D. Ariz. Sept. 30, 2022).

II. Governing Law

A. Rule 12(b)(1) of the Federal Rules of Civil Procedure

Motions to dismiss based on an exception to the FTCA's waiver of sovereign immunity are treated as motions to dismiss for lack of subject matter jurisdiction and reviewed under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *Garcia v. United States*, 526 F. Supp. 3d 576, 581 (D. Ariz. 2021). Defendant's motion to dismiss is a facial attack on the Complaint. *See A.P.F. v. United States*, 492 F. Supp. 3d 989, 993-94 (D. Ariz. 2020), *citing Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In ruling on such a motion, the Court accepts the allegations of the Complaint as true and affords Plaintiff the benefit

² The Government never brought charges against Plaintiff, who was deported on or about May 21, 2018, after twenty-one days in detention. (ECF No. 1 at 27).

1 of all favorable inferences that can be drawn from the alleged facts. *E.g.*, *A.P.F.*, 492 F.
 2 Supp. 3d at 994. In the context of a Rule 12(b)(1) challenge in a FTCA case, the plaintiff
 3 has the burden of establishing the alleged facts place their claims within the FTCA’s waiver
 4 of immunity, and the United States bears the burden of establishing the applicability of an
 5 exception to the waiver of immunity. *See, e.g.*, *Bailey v. United States*, 623 F.3d 855, 859
 6 (9th Cir. 2010); *Prescott v. United States*, 973 F.2d 696, 701-02 (9th Cir. 1992); *A.P.F.*,
 7 492 F. Supp. 3d at 494.

8 **B. Federal Tort Claims Act**

9 The United States is immune from liability absent its consent, and the terms of that
 10 consent define the Court’s jurisdiction to entertain a suit against the United States. *E.g.*,
 11 *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The FTCA waives the Government’s
 12 immunity “under circumstances where the United States, if a private person, would be
 13 liable to the claimant in accordance with the law of the place where the act or omission
 14 occurred.” 28 U.S.C. § 1346(b)(1). However, the FTCA’s general waiver of immunity is
 15 subject to several exceptions. *E.g.*, *Dolan v. United States Postal Serv.*, 546 U.S. 481, 485
 16 (2006); *A.P.F.*, 492 F. Supp. 3d at 994. The waiver does not apply to:

17 Any claim based upon an act or omission of an employee of the
 18 Government, exercising due care, in the execution of a statute or regulation,
 19 whether or not such statute or regulation be valid, or based upon the exercise
 20 or performance or the failure to exercise or perform a discretionary function
 or duty on the part of a federal agency or an employee of the Government,
 whether or not the discretion involved be abused.

21 28 U.S.C. § 2680(a). These are commonly referred to as the “due care exception” and as
 22 the “discretionary function exception.”

23 **III. Analysis**

24 Defendant argues the FTCA does not waive sovereign immunity for the claims
 25 alleged in the Complaint. Two of Defendant’s arguments involve the FTCA’s general
 26 waiver of immunity; accordingly, Plaintiff bears the burden of showing the claims fall
 27 under the FTCA and the Court therefore has subject matter jurisdiction over the claims.
 28 *See C.M. v. United States*, 2020 WL 1698191, at *2 (D. Ariz. Mar. 30, 2020), *citing*

1 *Prescott v. United States*, 973 F.2d 696, 701-02 (9th Cir. 1992). Two of Defendant's
 2 arguments involve the FTCA's statutory exceptions, and Defendant bears the burden of
 3 establishing the exceptions apply in this case. *Id.* Regarding the FTCA's general waiver,
 4 Defendant argues there is no private analogue for the allegedly tortious misconduct of
 5 which Plaintiff complains. Defendant also asserts the Complaint attempts to bring claims
 6 based on the conduct of entire federal agencies. i.e., "systemic" or "institutional" tort
 7 claims, which are not actionable under the FTCA. With regard to the statutory exceptions
 8 to the FTCA's waiver of sovereign immunity, Defendant contends the allegedly tortious
 9 misconduct falls within the due care and discretionary function exceptions.

10 **A. General waiver of immunity**

11 **1. The "private person" analogue**

12 The FTCA waives sovereign immunity only with regard to "the negligent or
 13 wrongful act or omission of any employee of the Government," occurring in
 14 "circumstances where the United States, if a private person, would be liable to the claimant
 15 in accordance with the law of the place where the act or omission occurred." 28 U.S.C.
 16 § 1346(b)(1). To establish subject matter jurisdiction under the FTCA, a complaint must
 17 sufficiently allege that "a private individual under *like* circumstances would be liable under
 18 state law ..." *United States v. Muniz*, 374 U.S. 150, 153 (1963) (emphasis added), *citing*
 19 28 U.S.C. § 2674. The FTCA does not require *identical* or the *same* circumstances, only
 20 *like* circumstances. *See Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955); *Xue*
 21 *Lu v. Powell*, 621 F.3d 944, 947 (9th Cir. 2010). Recognizing that "the federal government
 22 could never be exactly like a private actor," the Ninth Circuit Court of Appeals'
 23 jurisprudence requires a court only "to find the most reasonable analogy" to a circumstance
 24 where a private individual would be liable, generally referred to as a "private analogue."
 25 *Dugard v. United States*, 838 F.3d 914, 919 (9th Cir. 2016) (internal quotations omitted).
 26 *See also United States v. Olson*, 546 U.S. 43, 45-46 (2005); *A.P.F.*, 492 F. Supp. 3d at 994,
 27 *citing LaBarge v. Mariposa Cnty*, 798 F.2d 364, 367 (9th Cir. 1986).

Defendant argues the Court does not have subject matter jurisdiction because the governmental conduct that Plaintiff challenges has no private analogue, asserting the claims arise out of federal statutory authority that only the federal government possesses. (ECF No. 15 at 22). Defendant contends: “Because only the federal government has the authority to enforce federal criminal and immigration laws and make detention determinations, there is no private-person analogue that would support a claim under the FTCA.” (*Id.*). Defendant argues that, because Plaintiff “does not dispute that he was lawfully held in secure adult immigration detention pending his immigration proceedings,” his claims “are essentially a challenge to where and with whom deportable noncitizens are detained. Such decisions are made pursuant to federal statutory authority and are in the sole province of the federal government; there is no private person counterpart.” (ECF No. 19 at 9-10).

The Arizona District Court has rejected Defendant’s argument regarding a private analogue and recognized the viability of loss of consortium and intentional infliction of emotional distress claims brought under the FTCA in cases factually similar to the instant matter. *See B.A.D.J.*, 2022 WL 11631016, at *4-5;³ *F.R. v. United States*, 2022 WL 2905040, at *3 (D. Ariz. July 22, 2022); *C.M.*, 2020 WL 1698191, at *2. The Arizona District Court has also recognized the viability of a negligence claim brought under the FTCA based on a government employee’s choice of a place of confinement for one in federal custody. *See Estate of Smith v. Shartle*, 2020 WL 1158552, at *1 (D. Ariz. Mar. 10, 2020). The Court finds persuasive the decisions issued in *B.A.D.J.*, *F.R.*, and *C.M.*, and finds Plaintiff has plausibly established their claims fall within the FTCA’s waiver of

³ Arizona defines loss of consortium as “a loss of capacity to exchange love, affection, society, companionship, comfort, care and moral support.” *Pierce v. Casas Adobes Baptist Church*, 782 P.2d 1162, 1165 (Ariz. 1989). The focus of loss of consortium is on the interference with the normal relationship between parent and child. *Bickler v. Senior Lifestyle Corp.*, No. CV-09-00726-PHX-DGC, 2010 WL 2292985, at *6 (D. Ariz. June 8, 2010). Separating a mother from her daughter would satisfy this definition under Arizona law. Therefore, the Court agrees with Plaintiffs that sufficient private analogues exist to permit their FTCA claims. *B.A.D.J. v. United States*, 2022 WL 11631016, at *5 (D. Ariz. Sept. 30, 2022).

1 sovereign immunity with regard to the requirement that a private individual under like
2 circumstances would be liable under state law.

3 **2. Direct, institutional, or systemic tort liability**

4 The FTCA authorizes suits against the United States for the tortious acts or
5 omissions of its employees and agents. *See Vander v. United States Dep't of Just.*, 268 F.3d
6 661, 663 (9th Cir. 2001); *Westbay Steel, Inc. v. United States*, 970 F.2d 648, 651 (9th Cir.
7 1992). The FTCA does not waive sovereign immunity for the tortious acts or omissions of
8 the entire government or an entire federal agency. *See* 28 U.S.C. § 2671; *Jones v. United*
9 *States*, 2021 WL 5505787, at *4 (D. Ariz. Nov. 24, 2021).

10 Defendant argues the Complaint alleges “institutional tort claims” rather than torts
11 based on the misconduct of individual employees. *Inter alia*, the Complaint alleges:

12 ... Before entering Arizona, Elias and others in his group spoke with
13 immigration officials who allowed them to cross the border. Shortly after
14 crossing the border, however, CBP agents apprehended them, throwing them
15 into a vehicle, injuring Elias’s knee.

16 After taking them into custody, the CBP agents took Elias and Jocelin
17 to the Yuma County Detention Center in Yuma, Arizona where immigration
18 officers confiscated their belongings, including Elias’s identification card
19 and his daughter’s birth certificate. At the time they were apprehended,
20 Jocelin developed a high fever. Elias and Jocelin were forced to wait
21 overnight in the detention center before the facility provided Jocelin with any
22 medical care. When Jocelin finally received medical attention, the doctor
23 prescribed her medication. Shortly thereafter, however, the immigration
24 officers confiscated the medication.

25 Elias and Jocelin were locked in a cell with about 90 other people for
26 three days at Yuma. The cell was so cold that it has been colloquially referred
27 to as “*la hielera*,” which means the “icebox” in Spanish. There were no beds
28 in *la hielera*. There was not enough space to lay down on the floor and there
were not enough aluminum blankets for all detainees. Everyone shared a sink
and a toilet. ...

... The only food Elias and Jocelin were given each day was one
dehydrated ramen noodle cup, uncooked and without water. The only water
available was from a sink near the toilet. At some point in time, Elias asked
the immigration officers for water, and the immigration officers responded

1 by asking him, "Who told you to come here?" Elias remained quiet and
2 neither he nor Jocelin was given any water.

3 On a separate occasion, the immigration officers asked Elias if he
4 came to the United States to work. Elias responded that there were people in
5 Guatemala who did not like him. Rather than assess whether Elias had a basis
6 for an asylum claim based on a well-founded fear of persecution, as required
by law, the immigration officers proceeded to tell Elias that whether people
liked him or not was not "their problem."

7 ... On the third day of their detention, immigration officers asked him
8 to sign several documents. The documents were in English and the
9 immigration officers did not explain their contents or their import. Even
10 though he did not understand what the documents said, when the immigration
officers became aggressive and demanded that he sign, Elias relented out of
fear.

11 ...The immigration officers told Elias that Jocelin was going to be
12 taken to Houston, Texas and that he would be sent there after her. Elias would
13 later learn that the immigration officers lied to him. That was the last time
14 Elias saw his daughter for 4 months and 22 days.

15 After his daughter was taken from him, Elias was not informed of his
16 daughter's whereabouts, and all his requests for information were ignored.
17 He was not allowed to use the phone to try to locate her. When he asked
immigration officers for his daughter's location, they told him they were not
responsible for looking after her. ...

18 ... He was also subject to unnecessarily cruel and inhumane treatment.
19 He was not given an opportunity to take a shower or brush his teeth. He found
20 it difficult to sleep and could not eat the uncooked noodles he was given.
21 Despite experiencing diarrhea for three days and vomiting, he was denied
any medical treatment.

22 At some point in time, Elias fainted due to lack of food. The other
23 individuals detained with Elias alerted the immigration officers that Elias had
fainted, but the immigration officers did not provide him with medical care.

24 ... On a separate occasion, Elias and other detainees in *la hielera* were
25 praying in a corner when the immigration officers approached them and
26 accused them of plotting an escape from the facility. The immigration
27 officers proceeded to place Elias in a separate holding cell for two days. Elias
28 refers to this separate holding cell as the "*perrera*," a room where they
detained individuals who were "misbehaving." The room was the size of a
restroom and was crammed with more than twenty people in it. There was

1 barely any room to stand, much less sit or sleep on the floor. Elias did not
 2 receive food while he was in the *perrera* and was forced to drink water from
 the sink.

3 ***

4 On or about May 3, 2018, Jocelin was forcibly separated from her
 father in Yuma, Arizona and sent to a detention center in Miami, Florida,
 5 without a parent, guardian, or family member. Jocelin was terrified.
 6 Compounding her fear from being forcibly removed from her father, she was
 7 frightened of flying on an airplane for the first time. When she arrived at the
 detention center, she was asked to take a shower. After she showered, she did
 8 not have any clothes to change into and was forced to wait naked for an hour
 until immigration officers brought her clothes. Immigration officers then
 9 gave her vaccinations without any prior authorization from her parents. After
 she was given the vaccinations, she became sick and was sent to the hospital.

10 ...

11 ... Jocelin was sent to school at the detention center. She was not able
 12 to play outside because she did not have any tennis shoes. Jocelin asked for
 tennis shoes, but the immigration officers told her that there were no tennis
 13 shoes there. ...

14 Due to Jocelin's severe depression and inconsolable crying from
 15 being forcibly removed from her father, a case manager contacted Jocelin's
 mother in Guatemala and asked whether they could put Jocelin up for
 16 adoption. Shocked by the request, her mother refused and demanded that the
 immigration officers send Jocelin back to Guatemala. In late summer 2018,
 17 Jocelin received a new case manager who informed her that she was going
 back to Guatemala... On or around September 25, 2018, Jocelin was reunited
 18 with her family, nearly five months after the forced separation.

19
 20 (ECF No. 1 at 23-28).

21 The Government cites *Lee v. United States*, 2020 WL 6573258, at *6 (D. Ariz. Sept.
 22 18, 2020), in characterizing Plaintiff's claims as "attribut[ing] the alleged tortious conduct
 23 to the government as a whole, often referring to 'the government' rather than specific
 24 tortious conduct on the part of specific federal employees." (ECF No. 15 at 23-24). In *Lee*,
 25 the plaintiff's allegations were found "too vague and conclusory" to support a FTCA claim,
 26 because the plaintiff failed to specify any employee's role in the alleged negligent act. *See*
 27 2022 WL 2905040 at *5-6. This matter is distinguishable from *Lee*. The Complaint does
 28 contain condemnations of various administration and agency policies regarding

immigration and the initiation of programs bearing on the treatment of those entering the United States seeking asylum, including the separation of parents from their children, such as the “El Paso Initiative,” the “family separation policy,” and the “Zero-Tolerance Policy.” To the extent the Complaint can be read to assert claims against the United States for the tortious misconduct of the government itself or government agencies, i.e., claims based on executive orders, memoranda, or policies regarding the separation of families entering the United States without authorization, the Court would be correct in dismissing the claims for lack of subject-matter jurisdiction because the FTCA waives sovereign immunity only for the tortious misconduct of individual government employees. However, the Complaint can plausibly be read to present claims predicated on the tortious misconduct of individual government employees (as quoted *supra*) and, accordingly, the Court has subject-matter jurisdiction over Plaintiff’s claims against the United States for the alleged tortious misconduct of specific, individual employees.

B. Statutory exceptions from waiver of sovereign immunity

1. Due care exception

The due care exception to the FTCA’s waiver of sovereign immunity bars claims “based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid ...” 28 U.S.C. § 2680(a). The District of Arizona has regularly followed the two-prong test established by *Welch v. United States*, 409 F.3d 646, 652 (4th Cir. 2005), to determine whether the due care exception applies. *See, e.g., A.P.F.*, 492 F. Supp. 3d at 995-96; *E.S.M. v. United States*, 2022 WL 11729644, at *5 (D. Ariz. Oct. 20, 2022); *F.R.*, 2022 WL 2905040, at *4; *C.M.*, 2020 WL 1698191, at *3. Pursuant to *Welch*, the due care exception applies if a statute or regulation “specifically proscribes a course of action for an officer to follow,” and “the officer exercised due care in following the dictates of that statute or regulation.” 409 F.3d at 652.

1 The *A.P.F.* court, applying the *Welch* test, concluded:

2 The United States cites no statute or regulation requiring the detention
 3 of individuals who are “amenable to prosecution” in facilities different from
 4 those who are not “amenable to prosecution,” or any statute more generally
 5 requiring the separation of Plaintiffs upon their entry into the country. [] Nor
 6 could it: the family separations were conducted pursuant to executive policy,
 7 not pursuant to any statute or regulation. [] Actions taken pursuant to
 8 executive policy are not shielded by the due care exception. *Garcia-*
 9 *Feliciano v. United States*, [] 2014 WL 1653143, at *4 n.8 (D.P.R. Apr. 23,
 2014) (due care exception “would not apply here, however, because a
 policy—not a statute or regulation—pr[e]scribed the deputy’s conduct”).
 The United States has failed to prove that the due care exception applies.

10 492 F. Supp. 3d at 995-96 (internal citations omitted).

11 In subsequent cases, the District of Arizona has followed *A.P.F.* in rejecting the
 12 argument presented by Defendant with regard to the due care exception, concluding that
 13 actions taken pursuant to executive policy are not shielded by this exception to the FTCA’s
 14 waiver of sovereign immunity. See *B.A.D.J.*, 2022 WL 11631016, at *4; *A.I.I.L. v.*
 15 *Sessions*, 2022 WL 992543, at *3-4 (Mar. 31, 2022), citing *C.M.*, 2020 WL 1698191,
 16 at *3.⁴ This argument has also been rejected by other federal district courts. See *D.J.C.V.*
 17 *v. United States*, ___ F. Supp. 3d ___, 2022 WL 1912254, at *18 (S.D.N.Y. June 3, 2022);
 18 *A.E.S.E.*, 2022 WL 4289930, at *14; *Wilbur P.G. v. United States*, 2022 WL 3024319,
 19 at *5 (N.D. Cal. May 10, 2022); *Nunez Euceda v. United States*, 2021 WL 4895748, at *4
 20 (C.D. Cal. Apr. 27, 2021).

21 Additionally, Defendant fails to address how its employees took due care in
 22 following the dictates of any statute or regulation it cites, i.e., how the individual officers
 23 took due care to separate Plaintiff from his daughter without causing physical harm or

24 ⁴ With regard to the statute cited by Defendant in this matter, the *A.I.I.L.* court accepted the
 25 plaintiff’s argument that “the TVPRA, the only statute which mandates the transfer of minors to
 26 HHS custody, concerns children who arrive without their parents, but the children here arrived
 27 with their parents, were separated by the government, subsequently labeled ‘Unaccompanied
 28 Minor Children,’ and transferred to HHS custody.” *A.I.I.L. v. Sessions*, 2022 WL 992543, at *4
 (D. Ariz. Mar. 31, 2022) (“Because none of the statutory provisions cited by the government
 expressly mandate enforcement of a family separation policy, the due care exception does not
 apply.”).

1 severe emotional distress, or how it housed father or daughter in appropriate conditions
 2 and provided adequate medical care, food, and water. The Court finds Defendant has not
 3 satisfied its burden to establish that the due care exception is applicable.

4 **2. Discretionary function exception**

5 The discretionary function exception bars jurisdiction over a claim that is “based
 6 upon the exercise or performance or the failure to exercise or perform a discretionary
 7 function or duty on the part of a federal agency or an employee of the Government, whether
 8 or not the discretion involved be abused.” 28 U.S.C. § 2680(a). The Supreme Court has
 9 held that this exception to the FTCA’s waiver of sovereign immunity applies when the
 10 federal official’s actions involve an element of judgment or choice, and were based on
 11 considerations of public policy. *See United States v. Gaubert*, 499 U.S. 315, 322-23 (1991).

12 Defendant argues the decisions to detain Plaintiff in a secure adult detention facility,
 13 to separate him from his daughter, and to subject him and his daughter to particular
 14 treatment while in custody, are protected by the discretionary function exception because
 15 making detention determinations and setting particular conditions of confinement are
 16 discretionary and susceptible to policy analysis. However, notwithstanding Defendant’s
 17 discretion to make detention determinations and “set” conditions of confinement, the Ninth
 18 Circuit has held the discretionary function exception does not protect unconstitutional
 19 governmental conduct, reasoning that government officials have no discretion to violate
 20 the Constitution. *See, e.g., Nurse v. United States*, 226 F.3d 996, 1002 & n.2 (9th Cir.
 21 2000); *A.P.F.*, 492 F. Supp. 3d at 996; *B.A.D.J.*, 2022 WL 11631016 at *3 (disagreeing
 22 with *Nurse* but recognizing and following this precedent). Accordingly, if Plaintiff
 23 plausibly alleges constitutional violations, the discretionary function exception does not
 24 apply. *See Nurse*, 226 F.3d at 1002.

25 Plaintiff plausibly alleges that the separation of father and child, the manner in
 26 which this was done, and the conditions of confinement to which they were subjected,
 27 violated their federal constitutional rights, including the substantive due process right to
 28 family integrity. To the extent Plaintiff’s claims are based on the conditions of his

1 confinement, including the failure to provide Plaintiff with water and adequate nutrition,
 2 and the failure to provide both Plaintiff and his daughter with necessary medical care,
 3 Plaintiff has plausibly alleged the government officials' conduct violated the Eighth
 4 Amendment. These allegations place the relevant conduct outside the discretionary
 5 function exception for pleading purposes, notwithstanding any lack of complete clarity
 6 with regard to the exact constitutional protections that were allegedly violated. In *Nurse*,
 7 the Ninth Circuit reversed the dismissal of an FTCA claim based on the discretionary
 8 function exception because the plaintiff had alleged the governmental conduct was
 9 unconstitutional without specifying what constitutional mandate the officials violated. *See*
 10 226 F.3d at 1002 n.2. If "bare allegations" were sufficient to overcome a motion to dismiss
 11 in *Nurse*, the Court sees no reason why Plaintiff should be held to a higher standard here;
 12 other judges in this District have applied a plausibility standard to allegations of
 13 unconstitutional conduct at the motion to dismiss stage. *See, e.g., A.P.F.*, 492 F. Supp. 3d
 14 at 996 (denying a motion to dismiss based on the discretionary function exception where
 15 the plaintiffs plausibly alleged the government's separation of their families violated their
 16 constitutional rights); *F.R.*, 2022 WL 2905040, at *5-6; *A.I.I.L.*, 2022 WL 992543, at *4
 17 (denying a motion to dismiss based on the discretionary function exception where plaintiffs
 18 plausibly alleged the government's conduct violated their constitutional rights); *C.M.*, 2020
 19 WL 1698191, at *4 (denying a motion to dismiss based on the discretionary function
 20 exception where the plaintiffs plausibly alleged the Government's separation of their
 21 families violated their constitutional rights). For pleading purposes, Plaintiffs have
 22 adequately alleged the unconstitutionality of the conduct at issue. Thus, the United States
 23 has not established the discretionary function exception applies.

24 **IV. Conclusion**

25 Plaintiff has demonstrated that "a private individual under like circumstances would
 26 be liable under state law" for the allegedly tortious conduct committed by employees of
 27 the United States delineated in the Complaint. Additionally, the Complaint can plausibly
 28 be read to assert claims predicated on the tortious misconduct of individual government

employees, rather than asserting institutional torts. Defendant has failed to meet their burden of demonstrating a statutory exception to the FTCA's waiver of immunity.

Accordingly,

IT IS ORDERED that Defendant's motion to dismiss for want of subject matter jurisdiction (ECF No. 15) is **denied**.

Dated this 8th day of November, 2022.



Camille D. Bibles
United States Magistrate Judge